

U.S. Department of Homeland Security

Citizenship and Immigration Services

D5

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536



FILE: LIN 03 015 54861 Office: NEBRASKA SERVICE CENTER

Date OCT 30 2003

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:



Identifying data deleted to
prevent disclosure of
information that is
excluded from automatic
downgrading and declassification

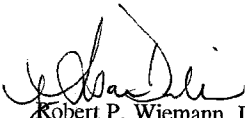
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks classification of the beneficiary as a trainee. The director determined that the training would consist of productive employment. The director also found that the training is general in nature, without a fixed training schedule. In addition, the petitioner did not establish that the training is unavailable in the beneficiary's home country.

On appeal, counsel states that there is no productive employment, and the training program is adequate and unavailable in the beneficiary's home country.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part:

(ii) Evidence required for petition involving alien trainee--(A) Conditions. The petitioner is required to demonstrate that:

(1) The proposed training is not available in the alien's own country;

(2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;

(3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

(4) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) Description of training program. Each petition for a trainee must include a statement which:

(1) Describes the type of training and supervision to be given, and the structure of the training program;

(2) Sets forth the proportion of time that will be devoted to productive employment;

(3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(4) Describes the career abroad for which the training will prepare the alien;

(5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.

(iii) Restrictions on training program for alien trainee. A training program may not be approved which:

(A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(B) Is incompatible with the nature of the petitioner's business or enterprise;

(C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(E) Will result in productive employment beyond that which is incidental and necessary to the training;

(F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

The record, as it is presently constituted, contains: a copy of the beneficiary's I-94 card, passport and visa; several letters from the petitioner; a training schedule; several reviews of the petitioner's restaurant; the beneficiary's diploma and course of study; several letters of reference for the beneficiary; the beneficiary's resume; the beneficiary's food handler license for the State of Washington; the beneficiary's social security card; and a letter from the Indonesia Department of Labor stating that similar training does not exist in that country.

The director denied the petition stating that the training is general in nature, without a fixed training schedule, objectives or means of evaluation. Counsel asserts that there is a fixed training schedule, objectives and means of evaluation. The training schedule submitted with the original petition stated that the training would be in three phases. The first phase is the main kitchen, where the beneficiary would train for one year to "Learn all facets of prep and cooking the unique foods of [the petitioner]." The year would be spent with eight months cooking, two months inventory and two months scheduling. Phase two is the bar, where the beneficiary would train for six months to "Learn how to mix American drinks and the house specialties of [the petitioner]." The six months is broken down into five months mixing drinks and one month of inventory. The final phase is administrative. The beneficiary would spend six months "Following an assistant manager when they [sic] are performing their [sic] duties. Learning how to account for receipts as well as run a point of sale system and computers." The six months is divided into three parts: two months for point of sales system and computers; two months for employee scheduling; and two months for accounting of sales and receipts. In response to the director's request for evidence, the petitioner provided some additional information, including that in phase one, the beneficiary will spend half of his time in classroom training, which the petitioner then describes as "on the job (at the kitchen)." In phase two, the beneficiary will also devote half of his time to classroom training. In phase three, the beneficiary will spend eight hours per week in classroom training. This schedule is vague, with little detail about how the training will actually occur and how

the beneficiary will be spending his days. In addition, there is no provision for evaluation anywhere in the record. The regulations clearly state that a training program cannot be approved if it deals in generalities with no fixed schedule, objectives, or means of evaluation. 8 C.F.R. § 214.2(h)(7)(iii)(A).

The director also found that the petitioner did not establish that the beneficiary would not be involved in productive employment. The director determined that, since the beneficiary has already been trained and worked as a chef in his home country as well as working for six months at a lodge in the United States, he would be working in a position of productive employment rather than in training with the petitioner. The petitioner states there will be no productive employment, but offers no proof beyond that statement. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the director found that most of the training would be available overseas. One-half of the proposed training relates to bartending and administration or management of a restaurant. These are skills that should be able to be acquired at any restaurant. The other half of the training is in cooking the petitioner's specific foods. This training may not be acquired anywhere beyond the petitioner's kitchen. Beyond the decision of the director, however, it is not clear that the training would prepare the beneficiary for a career outside the United States. The petitioner has one reference to the possibility of expanding into Asia, but there is no evidence in the record that this is the petitioner's business plan. Additionally, there is no evidence that there is a market for American-trained pan-Asian chefs or managers outside the United States.

Additionally, the training would be on behalf of a beneficiary who already possesses substantial training and expertise. He has worked as a chef for many years, and his final examination results indicate that he was trained in "drink and bartending," as well as "food & beverage service."

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.